Supreme Court, U.S.
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No. 00-1478

IN THE

Supreme Court of the United States

KENNETH WAYNE HARTER and JOHN ROBERT PAYNE,

Petitioners,

v.

C.D. VERNON, individually and in his official capacity as Sheriff of Rockingham County, and U.S. FIDELITY AND GUARANTY COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REASONS FOR DENYING THE WRIT

Contrary to petitioners' assertions, the decision below does not conflict with any holding of this Court or any federal circuit court. The absence of conflict is best demonstrated by the fact that the petitioners have failed to cite a single case supporting their interpretation of 28 U.S.C. § 1367(d). In an effort to convince this Court to review an immediate level state appellate court decision, petitioners argue that the decision below conflicts with *Crown, Clark & Seal Co. v. Parker*, 462 U.S. 345, 103 S. Ct. 2392, 76 L. Ed. 2d 628 (1983). However, this Court's decision in *Crown, Clark* does not mention, cite, or even remotely rely on 28 U.S.C. § 1367(d). As demonstrated by the discussion below, the North Carolina Court of Appeals opinion in *Harter v. Vernon*, 139 N.C. App. 85, 532 S.E.2d 836, *disc. rev. denied*, 453 N.C. 263, 532 S.E.2d 836 (2000) does not conflict with any decision of this Court, and it is actually in complete accord with circuit court decisions interpreting 28 U.S.C. § 1367(d).

I. THE DECISION BELOW DOES NOT CONFLICT WITH ANY PRIOR DECISION OF THIS COURT

Crown, Clark involved 42 U.S.C. § 2000e-5(f) and the effect which a denial of class certification would have on a putative class member's ability to file an individual action. In *Crown, Clark*, the respondent, a discharged black employee, filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging racial discrimination by his employer. *Crown, Clark*, 462 U.S. at 347, 103 S. Ct at 2394. Prior to the filing of the respondent's charge with the EEOC, a class action was instituted against the employer. Although the respondent had no knowledge of the class action, it was undisputed that the respondent was a member of the asserted class. *Id.* On November 9, 1978, the EEOC issued a Determination Letter finding no reasonable cause to believe the respondent's charge, and the respondent was issued a Notice of Right to Sue. *Id.* The District Court denied class certification

of the pending class action on September 4, 1980. *Id.* Within 90 days of the denial of class certification, the respondent filed a Title VII action against his employer alleging that his discharge was racially motivated. 462 U.S. at 348, 103 S. Ct. at 2394-2395.

Respondent's employer filed for summary judgment on the grounds that respondent's action was barred by 42 U.S.C. § 2000-e(5)(f)(1), which requires the initiation of a Title VII action within 90 days of a Notice of Right to Sue. The Fourth Circuit Court of Appeals reversed, holding that the respondent's action was timely because it was filed within 90 days of the denial of class certification. *Id.* This Court affirmed the Fourth Circuit's decision finding that "unless the statute of limitations was tolled by the filing of a class action, class members would not be able to rely on the existence of the suit to protect their rights." 462 U.S. at 350, 103 S. Ct. at 2396. The Court stated that "[a] putative class member who fears that class certification may be denied would have every incentive to file a separate action prior to the expiration of his own period of limitations." 462 U.S. at 351, 103 S. Ct. at 2396. This Court explained that, in the absence of tolling, the purpose of Federal Rule of Civil Procedure 23 would be frustrated, and a "needless multiplicity of actions" would result. *Id.* Thus, the Court held that the commencement of a class action suspended the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action. 462 U.S. at 353-354, 103 S. Ct. at 2397.

As the preceding discussion of *Crown, Clark* demonstrates, petitioner's reliance on this case is misplaced. The decision below involved 28 U.S.C. § 1367(d) and its interplay with North Carolina state law. *Crown, Clark* neither mentions nor interprets 28 U.S.C. § 1367(d). *Crown, Clark* involved issues related to class certification and Title VII actions which played no role in the decision below. Consequently, *Crown, Clark* cannot be in

direct conflict with the decision below because *Crown, Clark* involved a different statute, different issues, and different concerns.

Crown, Clark is also procedurally distinguishable from the decision below. Here, it is important to note that the petitioners created the situation of which they now complain by voluntarily stipulating to a dismissal of their appeal to the United States Court of Appeals for the Fourth Circuit. Thus, unlike the respondent in *Crown, Clark*, the petitioners were completely in control of their situation. Petitioners also voluntarily decided to wait almost four months to file a state court action involving substantially similar claims, substantially similar issues, and the same parties as their federal action. At the time petitioners made these voluntary decisions, they were on notice that they only had 30 days to refile in state court.

Section 1367(d) took effect in 1990, and the practice commentary to 28 U.S.C.A. § 1367(d) specifically instructs practitioners of the necessity of refiling an action within 30 days, unless a state statute provides for a more generous time period. *See* David D. Siegel, *Practice Commentary*, 28 U.S.C.A. § 1367 (1993), pp. 829, 836. *Bockweg v. Anderson*, 328 N.C. 436, 439, 402 S.E.2d 627, 629 (1991) had established that North Carolina did not provide a more generous period of time. Furthermore, less than two months after the petitioners filed their federal action in the Middle District of North Carolina, the Court of Appeals for the District of Columbia stated that Section 1367(d) only tolled the state statute of limitations for 30 days following a dismissal. *See Edmondson & Gallagher v. AlBan Towers Tenants Ass'n.*, 48 F.3d 1260, 1267 (D.C. Cir. 1995) (stating that "Section 1367(d) tolls the state statute of limitations on any state claim over which a federal court has exercised supplemental jurisdiction until 30 days after its dismissal"). Thus, unlike the respondent in *Crown, Clark*, the petitioners' situation was created by their own actions, and they should have been on notice of the consequences of their actions.

II. THE DECISION BELOW IS COMPLETELY IN ACCORD WITH THE CIRCUIT COURT DECISIONS AND STATE COURT DECISIONS INTERPRETING 28 U.S. § 1376(d)

As demonstrated by the previous section, the decision below in no way conflicts with any decision of this Court. The decision below also does not conflict with any decision of the circuit courts. In actuality, the decision below is clearly in accord with the decisions of numerous circuit courts. *See Edmondson*, 48 F.3d at 1267 (stating that "Section 1367(d) tolls the state statute of limitations on any state claim over which a federal court has exercised supplemental jurisdiction until 30 days after its dismissal"); *Seabrook v. Jacobson*, 153 F.3d 70, 72 (2d Cir. 1998) (stating: "Section 1367(d) ensures that the plaintiff whose supplemental state claim is dismissed has at least thirty days after dismissal to refile in state court. Some states, including New York, allow a longer period."); *Beck v. Prupis*, 162 F.3d 1090, 1099-1100 (11th Cir. 1998) (stating that "a dismissal under section 1367 automatically tolls the statute of limitations on the dismissed claims for 30 days . . ."); *Long v. Bando Mfg. of America*, 201 F.3d 754 (6th Cir. 1999) ("Section 1367(d) tolls the state statute of limitations on any state claim over which a federal court has exercised supplemental jurisdiction until 30 days after its dismissal"); *Hedges v. Musco*, 204 F.3d 109, 123 (3rd Cir. 2000) (citing *Beck* and *Seabrook* and stating "a dismissal under section 1367 tolls the statute of limitations on the dismissed claims for 30 days"). As these cases demonstrate, courts across the country agree with the decision below, and these cases illustrate that there is no basis for granting a writ of certiorari in this case.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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